SECURITY STATE BANK, DUNSEITH, NORTH DAKOTA
v.
DIRECTOR, OFFICE OF ECONOMIC DEVELOPMENT,
BUREAU OF INDIAN AFFAIRS

IBIA 98-28-A Decided April 7, 1999

Appeal from a decision partially denying a Claim for Loss under a loan guaranty.

Affirmed.

1. Indians: Financial Matters: Financial Assistance

Under the Bureau of Indian Affairs' loan guaranty program, the failure of a lender to report a default within the period specified in 25 C.F.R. § 103.36(a) entitles the Bureau to decrease the amount of the guaranty pro rata by the amount of the loan installments due during the period the default was unreported.

APPEARANCES: Richard P. Olson, Esq., and Kay M. Randall, Esq., Minot, North Dakota, for Security State Bank; David B. Johnson, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Director, Office of Economic Development.

OPINION BY ADMINISTRATIVE JUDGE VOGT

The Security State Bank, Dunseith, North Dakota (Bank) seeks review of an October 3, 1997, decision of the Director, Office of Economic Development, Bureau of Indian Affairs (Director; BIA), partially denying a Claim for Loss under a loan guaranty. For the reasons discussed below, the Board affirms the Director's decision.

Background

On June 8, 1977, BIA and the Bank entered into Loan Guaranty Agreement No. 0913-0234, which sets out general provisions concerning BIA's guaranty of loans made by the Bank. 1/ The provisions of the Loan Guaranty Agreement are similar or identical to the loan guaranty provisions in 25 C.F.R. Part 103.

1/ No copy of this agreement was included in the administrative record. Appellant submits a dated but unsigned copy.

On June 3, 1993, the Aberdeen Area Director, BIA, approved a 90% guaranty of a $400,000 loan by the Bank to Tomahawk Enterprises, Inc. (Tomahawk), a construction business located in Belcourt, North Dakota, and wholly owned by Raymond A. Poitra (Poitra). As evidence of his approval, the Area Director issued Loan Guaranty Certificate No. G933B1A1101. The loan documents included an April 2, 1993, Credit Agreement and a Promissory Note of the same date. In the Credit Agreement, the Bank agreed to extend a line of credit to Tomahawk in an amount not to exceed $400,000, for a period terminating on April 2, 1996. In the Promissory Note, Tomahawk acknowledged that it had received $311,000 as of April 2, 1993, and that "future principal advances are contemplated." It agreed to pay accrued interest monthly and to pay the principal "on or before maturity." With respect to security, the Promissory Note stated: "This note is secured by: RE Mortgage on Raymond A. Poitra personal dwelling; S.A. & F.S. on equipment, inventory, accounts and other rights to payment; lumber yard inventory; personal guaranty of Raymond A. Poitra."

By 1994, Tomahawk was having difficulty in meeting its payroll. The Bank made at least three additional loans to Tomahawk and/or Poitra to assist in meeting the payroll. Some or all of these loans were made on a "last in first out" basis, meaning that they were to be repaid prior to the guaranteed loan. The last payroll loan was made on June 30, 1995. See Bank's Aug. 26, 1996, Letter to BIA.

The Bank ceased advancing funds to Tomahawk under the line of credit after January 5, 1995. See Bank's Aug. 20, 1996, Letter to the Turtle Mountain Housing Authority.

On May 8 or May 25, 1995, the Bank was served with an Internal Revenue Service (IRS) levy on Poitra's accounts in the Bank. 2/

Tomahawk's last regular monthly payment of interest to the Bank was made on May 18 or 19, 1995. Tomahawk made partial payments on September 8, 1995, and November 1, 1995, but continued to fall further behind in its interest payments.

The Bank filed quarterly reports with BIA concerning the guaranteed loan. The record includes the Bank's reports dated July 6, 1995; October 12, 1995; and January 30, 1996. In the July 6, 1995, report, under a section titled "Borrower Information," the loan was shown as delin-

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2/ The Bank's Aug. 20, 1996, letter to the Turtle Mountain Housing Authority gives the date as May 8, 1995. The Bank's Aug. 26, 1996, letter to BIA gives the date as May 25, 1995. BIA has considered May 25, 1995, to be the date the Bank received the levy.

According to the Bank's Aug. 20, 1996, letter, IRS served a second levy on May 29, 1996. According to the cover letter for the Bank's May 22, 1996, Claim for Loss, the Bank had been served with an IRS tax lien in the amount of $269,039.15. This letter does not show the date the lien was served on the Bank.

No copies of any IRS documents concerning the levy(ies) or the lien are included in the record.

quent. Under a section titled "Loan Guaranty Classification," the loan was classified as substandard. Under "Comments," the Bank stated that it "classified this loan as a watch list status, one step prior to substandard."

In its report dated October 12, 1995, the Bank again showed the loan as delinquent and again classified it as substandard. Under "Comments," the Bank stated:

> The interest is currently accruing at the rate of $110.52 per day, therefore the unpaid interest figure of $18,787.80 represents about 170 days of unpaid interest; therefore it is seriously delinquent. I have asked the debtor on several occasions to make a payment on this bill with no activity.
>
> Would you please let me know your thoughts on this accrued interest figure and how long you will allow it to continue.

In its report dated January 30, 1996, the Bank showed the loan as defaulted and classified it as doubtful. In the Comments section, the Bank stated in part:

> Last week I talked to [the Credit Officer at BIA's Turtle Mountain Agency]. I inquired about loan guaranty, process to follow, what constituted default, workout loan arrangements and wording under default in [sic] instructions, concerning 15% of aggregate amount of loans insured. She was to call Aberdeen and get back to me. As of today, have not heard from her.

On March 15, 1996, the Bank filed BIA Form 5-4760, "Notice of Default/Claim for Loss" with the Superintendent, Turtle Mountain Agency, BIA. 3/ The Bank completed only the first part of the form, indicating that it intended the filing to serve only as a Notice of Default. The notice showed that the loan to Tomahawk had a balance due of $390,000 and had accrued unpaid interest in the amount of $30,599.15 as of March 15, 1996. It showed that the amount delinquent was $30,599.15.

The Bank's filing stated that notice of default had been sent to Tomahawk as of March 15, 1996. Under "Other Reasons for Declaration of Default," the Bank stated: "Line of credit loan agreement requires interest to be paid monthly, last interest payment was 11-1-95 for $5164.33 (partial). Loan maturity date is 4-2-96."

3/ Although it is not entirely clear, the Bank apparently deemed Tomahawk's default to have occurred on Jan. 30, 1996, and so filed its Notice of Default 45 days later. See 25 C.F.R. § 103.36(a), quoted and discussed below.

The Bank makes no specific statement in this appeal as to when it considered Tomahawk's default to have occurred.

The Superintendent responded on March 29, 1996. The Board finds his letter confusing. In this appeal, the Director construes the letter as informing the Bank that "it had 45 days from March 15, 1996 to submit a completed Notice of Default/Claim for Loss form, or to restructure the loan," Director's Answer Brief at 5, and this clearly seems to be the way the Bank understood it. 4/

On April 29, 1996, the Bank asked for "a further extension of time [of at least two weeks] to come up with the necessary agreement." By letter of April 30, 1996, the Superintendent stated that the Bank had until May 15, 1996, in which to act and that, if necessary, the Superintendent could grant more time.

The Bank did not submit another request for extension of time. It missed the May 15, 1996, deadline, however, and did not submit a Claim for Loss until May 22, 1996. 5/

The Claim for Loss, again filed on BIA Form 5-4760, showed a total amount delinquent of $427,910.31, including $390,000 in principal and $37,910.31 in accrued interest. It showed the amount of the 90% guaranty as $385,119.28.

In the cover letter transmitting the Claim for Loss, the Bank stated:

> It is our decision at this time to file a claim under the BIA Guaranty as it appears the debtor will not have the ability to liquidate this loan without foreclosure. The debtor does not have the ability to pay the accrued interest to date which would be required in order to come up with a new amortization schedule; this bank has been served with an IRS Tax Lien in the amount of $269,039.15; Small Business Administration has been in touch with us concerning the delinquency of their disaster loan; and is delinquent on most other liabilities. His property insurance has also lapsed.

Bank's May 22, 1996, Letter to the Superintendent.

4/ If this is what the Superintendent meant to say, however, he clearly misinterpreted the applicable regulation. See 25 C.F.R. § 103.36(a), quoted below.

5/ In an Aug. 21, 1996, letter to BIA, the Bank explained:

"[T]he reason we did not file the notice of claim until May 22, 1996, we did not receive the audited financial statement until May 20, 1996, after business hours. We had been waiting on that for some time and I failed to notice in [the Superintendent's] letter the May 15, 1996 date, however his letter dated 4-30-96 clearly states that more time was available if May 15, 1996 was not enough. I simply failed to request that extra time which he would have granted as we still were waiting for the financial statement."
Bank's Aug. 21, 1996, Letter at 2.

The Superintendent requested some additional information from the Bank. Following receipt of the information, the Superintendent recommended, in a June 14, 1996, memorandum to the Area Director, that BIA pay the Claim for Loss. Area Office staff then discussed the matter with staff in the office of the Director. In a July 29, 1996, memorandum to the Area Director, the Director stated:

> [T]he subject claim for loss raises several questions. What were the terms of the line of credit? (i.e. Was the borrower required to pay down the principal annually or only at the three year maturity?) If the November 1, 1995 interest payment was a partial payment, was the borrower in default on November 1, 1995? If so, did the lender notify the Bureau on a timely basis as required in the Loan Guaranty Agreement? Why did the lender wait until March 15, 1996 to send the borrower a default notice? What actions has the lender taken to protect the security since November 1, 1995?

Director's July 29, 1996, Memorandum at 1-2.

Correspondence between the Area Office, the Bank, and the Director's Office continued. On September 10, 1996, the Area Director formally submitted the Claim for Loss to the Director for payment. However, the Director remained unsatisfied with the information provided to her.

On November 7, 1996, Tomahawk filed a petition for liquidation under Chapter 7 of the Bankruptcy Code. Apparently Poitra also filed a personal bankruptcy petition, although no formal notice of his petition was sent to the Bank or BIA.

The Area Director renewed his request for payment on December 5, 1996. Responding to the Area Director on December 30, 1996, the Director stated:

> [Tomahawk's] tax problem first came to the Bank's attention May 25, 1995 when the Bank received a tax levy against [Tomahawk's] bank accounts. Had the Bank taken prudent lender actions in servicing this loan, losses could have been minimized and the guaranty payment substantially less than requested.
>
> Therefore, we are recommending offsets to the guaranty payment based on the following factors:
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> 1) Any loan advances made after the May 1995 delinquency should not be guaranteed. In other words, the loan guaranty payment should be offset by any loans advanced after that month.
>
> 2) Any deterioration in the value of our security from July 19, 1995 (60 days after the May 1995 delinquency) to its value at liquidation should be deducted from the amount claimed under the Loan Guaranty Agreement.

3) Any payment under this claim for Loss be withheld until bankruptcy proceedings have been completed.

Director's Dec. 30, 1996, Memorandum at 2. The Director requested that the Area Director seek an opinion from the Field Solicitor, Twin Cities, to assist "in assessing the value of offset against the guaranty payment and whether a payment is merited." Id. at 3.

An attorney in the Field Solicitor's Office issued an opinion on February 7, 1997, concluding that BIA had a weak case for denying payment on the guaranty, and also recommending against the offsets suggested by the Director.

After reviewing the attorney's opinion, the Credit Agreement, and additional information from the Bank, the Director sent another memorandum to the Area Director. She stated:

> We understand that [Tomahawk] was in default of its tax obligation in May of 1995. [The] Bank became aware of the IRS problem when the bank received a tax levy against borrower accounts on May 25, 1995. Since the Credit Agreement contains an affirmative covenant which states that the borrower will pay all federal, state and local taxes; and a default provision states that the borrower is in default for failure to observe or perform any of the provisions of the Credit Agreement, this event triggered the first event of default. Likewise when the borrower failed to make its June 1995 interest payment (per the lender's July 7, 1995, [sic, should be July 6, 1995] quarterly report), this event also triggered default. Internally, [the] Bank classified the loan in default on January 30, 1996, (per the lender's quarterly report). The first "default notification" to the borrower, however, occurred on March 15, 1996. * * *
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> * * * * * * *
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> In this case, the lender did not adhere to the requirements for the 45 day notification [in 25 C.F.R. § 103.36 and section 20 of the Loan Guaranty Agreement]. Furthermore, the lender did not request payment on the guaranty; did not negotiate forbearance with BIA approval; did not notify the BIA that foreclosure was necessary within the 60 day regulatory period nor request an extension between May 25, 1995, and March 15, 1996. Therefore, we are decreasing the amount of the guaranty pro rata by the amount of the due installment (i.e. interest due on the line of credit). You are authorized to process payment of the $390,000 principal and of the accrued interest through, but no later than March 28, 1997, excluding interest for the period from May 25, 1995 to March 15, 1996. * * *

Director's Mar. 11, 1997, Memorandum at 1-2. The Director also ordered the Area Director to terminate the Bank's Loan Guaranty Agreement, stating that the Bank had shown itself unable

to comply with the Agreement and the governing regulations and unable to adequately service guaranteed loans. 6/

The Bank calculated the amount of the payment called for under the Director's March 11, 1997, memorandum at $390,275.14. In early April 1997, BIA authorized payment in that amount to the Bank. 7/

On April 28, 1997, the Bank wrote to the Deputy Commissioner of Indian Affairs, requesting payment of interest for the period May 25, 1995, to March 15, 1996, in the amount of $30,599.15. The Bank also requested that BIA reimburse it for expenses it incurred in connection with Tomahawk's bankruptcy proceedings. The Bank's letter was referred to the Director, who asked the Bank to itemize the expenses for which it was seeking reimbursement. On July 3, 1997, the Bank submitted an itemized list of expenses and repeated its request to be paid interest in the amount of $30,599.15.

On October 3, 1997, the Director issued the decision on appeal here. She authorized payment of the bankruptcy-related expenses in the amount requested by the Bank. However, with respect to interest, she stated:

> We are not authorizing payment of interest accrued during the period May 25, 1995, to March 15, 1996, since the lender did not notify [BIA] within 45 days that a default had occurred; did not notify BIA that foreclosure was necessary nor request an extension or forbearance within 60 days; and did not make a timely request for payment on the guaranty. These omitted acts are all requirements in our loan guaranty agreement.

Director's Oct. 3, 1997, Decision at 1.

Discussion and Conclusions

The regulatory provision central to this dispute is 25 C.F.R. § 103.36(a), which provides:

6/ The record does not show whether this action was ever taken. In any event, termination of the Loan Guaranty Agreement is not at issue in this appeal.

7/ The date on the BIA voucher appears to be Apr. 6, 1997.

In its opening brief, the Bank states that the amount it received represented 90% of the principal and 90% of accrued interest for the period Mar. 16, 1996, to Mar. 28, 1997. Bank's Opening Brief at 2. In its reply brief, the Bank acknowledges that it was paid for 100% of accrued interest for the period Mar. 16, 1996, to Mar. 28, 1997. Bank's Reply Brief at 1 n.1, 3 n.3.

> Within 45 calendar days after the occurrence of a default, the lender shall notify the Commissioner by certified or registered mail showing the name of borrower, guaranty certificate number, amount of unpaid principal, amount of principal delinquent, amount of interest accrued and unpaid to date of notice, amount of interest delinquent at time of notice, and other failure of the borrower to comply with provisions of the loan agreement. Within 60 calendar days after default on a loan, the lender shall proceed as prescribed in either paragraph (b), (c), or (d) of this section, unless an extension of time is requested by the lender and approved by the Commissioner. The request for an extension shall explain the reason why a delay is necessary and the estimated date on which action will be initiated. Failure of the lender to proceed with action within 60 calendar days or the date to which an extension is approved by the Commissioner shall cause the guaranty certificate to cease being in force or effect. If the Commissioner is not notified of the failure of a borrower to make a scheduled payment or of other default within the required 45 calendar days, the Commissioner will proceed on the assumption that the scheduled payment was made and that the loan agreement is current and in good standing. The Commissioner will then decrease the amount of the guaranty pro rata by the amount of the due installment and the lender will have no further claim for guaranty as it applied to the installment, except for the interest subsidy on guaranteed loans which may be due. [8/]

The principal issue in this appeal is whether the Bank gave timely notice of default under this provision. In order to resolve that issue, it is first necessary to determine when default occurred.

"Default" is defined in 25 C.F.R. § 103.1 as "failure of a borrower to: (1) Make scheduled payments on a loan when due, (2) Obtain the lender's approval for disposal of assets mortgaged as security for a loan, or (3) Comply with the covenants, obligations, or other provisions of a loan agreement."

The Credit Agreement includes a section titled "Events of Default," which provides in part:

> The borrower will be in default under this Agreement if one or more of the following events occur:

8/ 25 C.F.R. § 103.36(b), (c), and (d) authorize the lender, respectively, to request payment under the guaranty; to agree to forbearance for the benefit of the borrower, subject to the approval of BIA; or to advise BIA that suit or foreclosure is necessary and to proceed to foreclosure and liquidation of all security interests.

Section 20 of the Loan Guaranty Agreement contains a provision similar to 25 C.F.R. § 103.36 and, as relevant here, includes the same 45-day and 60-day periods for notice and action by the lender.

> - Failure to make, when due, any payments required under this Agreement, or the note during the initial or any renewal or extended term;
>
> - Failure to observe or perform any of the provisions of this Agreement, other than the payment of money, and the continuance of such failure for 20 days after notice from the Bank.

Credit Agreement at 4.

The default provision of the Promissory Note states in part:

> I will be in default if any one or more of the following occur: (1) I fail to make a payment on time or in the amount due. * * * (3) I fail to keep any other promise I have made in connection with this loan.

Promissory Note at 2.

In its opening brief, the Bank presents what appear to be four different, but related, points of discussion. None of these points is developed into a complete argument, and the Board has had to make some inferences as to what the Bank actually intended to argue. 9/

First, the Bank discusses the Credit Agreement, quoting from the Remedies section 10/ and contending that, "had the Bank decided in either May or June 1995 that a default had occurred they were still in complete compliance with the Credit Agreement." Bank's Opening Brief at 5.

9/ The Board has no obligation to make an appellant's argument for it. E.g., Elliott v. Portland Area Director, 31 IBIA 287, 293 (1997), and cases cited therein. In this case, however, the Bank's discussions are so unfocussed that the Board is unable to address this appeal at all without first attempting to deduce the Bank's meaning. To the extent the Board has failed in this attempt, the Bank has no one to blame but itself.

10/ The Remedies section of the Credit Agreement provides:

"If any event of default exists, the Bank may take one or more of the following actions:

"- Waive the default, provided, that no such waiver will be effective unless it is in writing.

"- Refuse to make any additional advances under this Agreement or the Note;

"- Declare the entire outstanding balance on the Note, plus any accrued interest, to be immediately due and payable, and demand payment without further notice; and

"- Proceed to exercise its rights and remedies with respect to the Collateral or any Guaranty of the Borrower's obligations to the Bank.

"- Failure of the Bank to exercise any right or power under this Agreement or other tolerance of a condition of default shall not affect, or constitute a waiver of, the Bank's right to take any action in the future."

The Bank appears to be contending that, because in May and June 1995 it had not yet chosen to exercise any of the remedies available to it under the Credit Agreement, then, ipso facto, no default had occurred. Any such contention must be rejected. Nothing in the Credit Agreement, let alone the regulations in 25 C.F.R. Part 103, supports the notion that no default exists until a remedy is invoked by the Bank.

Next, the Bank refers to the IRS levy served on the Bank in May 1995. It quotes from a March 10, 1997, letter it wrote to the Director in which it stated:

> We do not feel that the receipt of an IRS tax levy is grounds for liquidation of a business. When a levy is received, if we have a loan with that customer, we make contact with them to encourage them to get the problem corrected and that happened in this case. The debtor had several contracts in place at that time, was working on bidding more work, had provided us with receivables he was expecting soon, we have adequate collateral to support the loan balances, we felt debtor had plenty of opportunities to get his business working properly again.

Bank's Opening Brief at 5-6, quoting from Bank's Mar. 10, 1997, Letter at 1.

Although it does not follow up on this quotation, the Bank presumably intended to argue that it did not consider the IRS levy to be evidence of a default by Tomahawk under the Credit Agreement. For such an argument, it presumably intended to rely on the second default provision in the Credit Agreement ("Failure to observe or perform any of the provisions of this Agreement, other than the payment of money, and the continuance of such failure for 20 days after notice from the Bank"), a provision which, in essence, allows the Bank to control the point at which default occurs.

The Credit Agreement, in a section titled "Affirmative Covenants [-] Borrower," required Tomahawk to "[p]ay all federal, state and local taxes, license fees or similar charges as such become due." Credit Agreement at 2. Tomahawk fell out of compliance with this requirement sometime prior to May 25, 1995. 11/

The definition of "default" in 25 C.F.R. § 103.1, as relevant to the tax issue, states that default is "failure of a borrower to * * * [c]omply with the covenants, obligations, or other provisions of a loan agreement." Tomahawk was clearly in default under this definition on May 25, 1995, even if it was not in default under the Credit Agreement.

11/ While BIA construed Tomahawk's default as having occurred when the Bank became aware of it in May 1995, Tomahawk had undoubtedly been delinquent in its tax obligations for some time before IRS resorted to serving a levy.

Tomahawk's June 1995 failure to make its monthly interest payment was a straightforward default under both the regulations and the Credit Agreement. The Bank does not specifically address this default. However, given its reference to the Remedies section of the Credit Agreement, discussed above, the Bank may be contending that the Credit Agreement gave the Bank discretion to determine the date of default, even with regard to this kind of default.

Throughout its opening brief, the Bank bases its discussion upon the Credit Agreement, rather than the regulations. In its reply brief, the Bank denies that it considers the Credit Agreement higher authority than the regulations. However, it continues to contend that it was within its rights under the Credit Agreement and continues to sidestep any discussion of its obligations under the regulations. Bank's Reply Brief at 4-6. The Bank's thesis clearly seems to be twofold: (1) It had the right under the Credit Agreement to decide when a default occurs, and (2) its decision as to default under the Credit Agreement controls for purposes of 25 C.F.R. § 103.36. At least with respect to the second part of this thesis, the Board disagrees.

While the Credit Agreement sets out the rights and obligations of the Bank vis-a-vis Tomahawk, the regulations in 25 C.F.R. Part 103 and the Loan Guaranty Agreement set out the rights and obligations of the Bank vis-a-vis BIA. Accordingly, the Bank was required to exercise its rights under the Credit Agreement in a manner which also fulfilled its obligations under the regulations and the Loan Guaranty Agreement. Because it is the Bank's obligations to BIA which are at issue in this appeal, it is the provisions of the regulations and the Loan Guaranty Agreement which control here.

Despite some differences in wording, the regulations and the Credit Agreement are not incompatible with respect to defaults, and the Bank clearly could have met its obligations under the regulations while at the same time exercising its rights under the Credit Agreement. This is illustrated in an argument made in the Director's answer brief, wherein the Director describes a way in which the Bank might reasonably have proceeded upon receipt of the IRS levy. The Director contends that the Bank should have promptly made a written demand that Tomahawk resolve its tax problem, giving Tomahawk the 20-day response period specified in the Credit Agreement. The Director observes that, at the end of that period, depending upon the response made by Tomahawk, the Bank would have had information enabling it to determine whether or not the default could be promptly resolved, at a time well within the 45-day period specified in 25 C.F.R. § 103.36(a) for reporting defaults to BIA. 12/

12/ The Director provides this illustration in connection with her argument that the Bank failed to follow "accepted standards employed by prudent lenders," as required by 25 C.F.R. § 103.46(a).

The Director contends that the Bank's "substandard loan servicing efforts * * * lull[ed] one or two BIA officials into a false sense that * * * Tomahawk's troubles * * * were minor and of short duration." Director's Answer Brief at 13. She contends further that, because the Bank misrepresented the status of the loan to BIA, its claim for loss was subject to 25 C.F.R. § 103.49(c),

Under the regulations and the Loan Guaranty Agreement, the Bank was required to report Tomahawk's tax payment default no later than 45 days after receipt of the IRS levy and was required to report Tomahawk's failure to make its June 1995 interest payment within 45 days after that default. The Bank did not do so.

Next, the Bank contends that its position is supported by the February 7, 1997, memorandum of the attorney in the Field Solicitor's Office and by documents prepared by BIA Area Office and Agency staff.

It is clear from the record that the Director disagreed with the position taken by Area Office and Agency staff. It is also clear that she disagreed with the attorney's advice to some extent, although she evidently agreed with his view that BIA should not deny payment entirely. In her answer brief in this appeal, the Director states a belief that the positions taken by the attorney and by the BIA field staff were based in part upon incomplete information. Director's Answer Brief at 17 n.23. She also indicates that she continues to disagree in part with the attorney's position. Director's Answer Brief at 8 n.9; 17 n.23.

The mere fact that the Director disagreed with BIA Area Office and Agency staff and disagreed in part with the advice given by the attorney does not mean that her decision was wrong. The Bank points to nothing in the positions taken by those individuals which demonstrates error in the Director's decision.

Finally, the Bank contends that it kept BIA fully informed of the status of the loan through its quarterly reports of July 6, 1995; October 12, 1995; and January 30, 1996, and that it was in constant communication with Area Office and Agency staff about the loan. 13/ It then

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fn. 12 (continued)
which provides in part: "There shall be no liability on the part of the United States to reiburse a lender on a guaranteed loan for that amount of the guaranteed loss caused by: * * * (3) The lender's willful or negligent action which permitted a fraud, forgery or misrepresentation."

The Director did not base her decision on 25 C.F.R. § 103.49(c). Because it affirms the Director's decision on the grounds stated therein, the Board finds it unnecessary to determine whether her decision would also have been justified under 25 C.F.R. § 103.49(c).

13/ The Bank also states that it submitted a Problem Loan Report dated Aug. 15, 1995, but does not state when it submitted that report. Bank's Opening Brief at 8. Although an Aug. 15, 1995, document titled "Problem Loan Reporting Form" is included in the record (Ex. 35), there is nothing to suggest that this document was sent to BIA at the time it was prepared. The document appears to be an internal Bank document. It lists several loans to Tomahawk, including the loan guaranteed by BIA. According to the Bank's internal comment sheet (Ex. 43), the Problem Loan Report was presented to the Bank's loan committee on Aug. 15, 1995.

The record copy of the Problem Loan Report shows that the Bank telefaxed it to someone (presumably someone in BIA) on Mar. 5, 1997.

asserts: "If BIA had wanted a different Notice of Default to be filed at any time or if it had wanted the Bank to institute foreclosure procedures, then BIA should have responded differently to the Quarterly Reports and other communications they received from the Bank." Bank's Opening Brief at 8.

This contention may be taken in two different ways. The Bank may be arguing that its quarterly reports constituted the notice of default required by 25 C.F.R. § 103.36(a). Alternatively, it may be arguing that it was not obligated to file the notice of default required by 25 C.F.R. § 103.36(a) until BIA told it to do so.

The first of these two possible arguments poses obvious problems for the Bank, because it would require the Bank to concede that default occurred earlier than it would now admit. Further, such an argument would be inconsistent with the Bank's filing of a formal Notice of Default on March 15, 1996, a step which the Bank presumably would not have taken if it had believed the quarterly reports constituted notice of default under 25 C.F.R. § 103.36(a). The argument would also be inconsistent with the Bank's statement in an April 2, 1996, letter to BIA that it wanted BIA to "consider March 15, 1996 as the date of Notice of Default." In any event, none of the quarterly reports constitutes a clear notice of default. Certainly, none complies with the requirements of 25 C.F.R. § 103.36(a). Therefore, to the extent the Bank may be contending that its quarterly reports constituted notice under 25 C.F.R. § 103.36(a), the Board rejects that contention.

Alternatively, the Bank may be arguing that it was not obligated to file the notice required by 25 C.F.R. § 103.36(a) until BIA told it to do so. Clearly, however, the regulation places the obligation squarely on the lender to give the required notice. Nothing in the regulation suggests that a lender's responsibility to give notice of default may be shifted to BIA. Therefore, to the extent the Bank may be contending that it was not required to file a notice of default until advised to do so by BIA, the Board rejects that contention.

The Director states that she "honored the vast majority of [the Bank's] Claim for Loss," in part because of the "many conflicting, and apparently inaccurate, statements made to [the Bank] by BIA officials." Director's Answer Brief at 16-17. She contends, however, that the Bank "should count itself fortunate to have been paid anything at all for its Guaranty Certificate." Id. at 2. The Board notes that, had the Director held the Bank to the letter of the regulations, she might well have found the Loan Guaranty Certificate invalid because of the Bank's failure to submit a Claim for Loss or take other action under 25 C.F.R. § 103.36 within 60 days after Tomahawk's defaults in May and June 1995. See 25 C.F.R. § 103.36(a): "Failure of the lender to proceed with action within 60 calendar days [after default on a loan] or the date to which an extension is approved by the Commissioner shall cause the guaranty certificate to cease being in force or effect."

[1] The Director contends that she

> was clearly justified in not paying that portion of [the Bank's] Claim for Loss relating to interest that accrued over an extended period of time, during which Tomahawk was in default as a matter of law, yet [the Bank] failed to follow regulatory procedures and to fully apprise the BIA of the extent and nature of Tomahawk's problems.

Director's Answer Brief at 17.

The Board agrees. It finds that the Director properly "decreased the amount of the guaranty pro rata" by the amount of the interest due during the period May 25, 1995, to March 15, 1996, as BIA was entitled to do under 25 C.F.R. § 103.36(a).

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Director's October 3, 1997, decision is affirmed. 14/

Anita Vogt
Administrative Judge

I concur:

Kathryn A. Lynn
Chief Administrative Judge

14/ The Director's request for oral argument is denied.